87-1915 (2)

Supreme Court, U.S.
FILED
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CLERK

NO. 88-

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

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EBENEZER GARCIA-CABAN,
CARMEN MILAGROS ALCINA, ET AL.

Petitioners,

v.

UNIVERSITY OF PUERTO RICO,
CAYEY REGIONAL COLLEGE, ET AL.

Respondents.

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**SUPPLEMENTAL APPENDIX**

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## SUPPLEMENTAL APPENDIX


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CERTIFIED TRANSLATION:

IN THE SUPREME COURT OF PUERTO RICO

No. RE-86-121 Review

Ref. RE-86-217

Ebenezer García-Cabán,

Carmen Milagros Alcina, etc.,

Plaintiffs-Appellees

vs.

University of Puerto Rico,

Cayey Regional College, etc.,

Defendants-Appellants

---

Court's Opinion, issued by ASSOCIATE JUSTICE MISTER HERNANDEZ-DENTON

San Juan, Puerto Rico, 22 December 1987.

We revoke the judgment of the Superior Court, San Juan Section, which granted a complaint for permanent

IN THE SUPREME COURT OF PUERTO RICO

No. RE-86-121 Review

Ref. RE-86-217

Ebenezer García-Cabán, etc.,

Plaintiffs-Appellees

vs.

University of Puerto Rico, etc.,

Defendants-Appellants

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ERRATA SHEET

On page A-1 of the Certified Translation of the Court's Opinion issued by ASSOCIATE JUSTICE MISTER HERNANDEZ-DENTON, as reads "San Juan, Puerto Rico, 21 January 1988" should read "San Juan, Puerto Rico, 22 December 1987."

San Juan, Puerto Rico, April 20, 1988.

/S/ Ernesto Quidgley

ERNESTO QUIDGLEY

U.S.C.C.I.

(PL 95-539, 28 USC 1827)

CERTIFIED TRANSLATION:

IN THE SUPREME COURT OF PUERTO RICO

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Ebenezer García-Cabán,

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University of Puerto Rico,

Cayey Regional College, etc.

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Dissenting Opinion of Associate Justice Mister Negrón-García

San Juan, Puerto Rico, 22 December 1987.

I

"The forms of justice are only the crust or wrappings of rights. Once said crust is broken, we find only men, things and deep longings for life. Justice is

not only a continent; within it flows human life, intimate and dramatic, since in it the very destiny of man is being decided instant by instant. To know what is justice worth, it is then necessary to know what is the judge worth, in his intimate human dimension, in the system wherein he lives; if the man is free in the world that surrounds him, then justice is saved; if he is not, justice is unavoidably lost." Eduardo J. Couture, Estudios de Derecho Procesal Civil, (Studies on Civil Procedural Law), Ed. Depalma, Vol. I, 1978, page 156. From this perspective, the most complete judicial deference towards univeristy authorities does not justify that claims like the one at bar be suffocated for the sake of an excessive attachment to the administrative channels.

The judgment of the Superior Court,

San Juan Section, which granted the complaint on injunction and damages filed by Ebenezer García-Cabán and his wife, Carmen Milagros Alcina, against the University of Puerto Rico, the Cayey Regional College and professors José Luis Monserrate-Vila, Luis Guillermo Rodríguez, René A. Hernández, Castora Lozano, Pío López-Martínez, Miguel Reckman and José González should be confirmed because it is correct and fair. Said ruling decreed that the dismissal of García-Cabán from the Cayey University College was not valid and determined that the evaluation of his teaching work -utilized to justify said action- was flawed by prejudices and ideological and personal animosities as well as by economic conflicts. Consequently, it ordered his reinstatement to the position of Assistant Professor which he held, on a

probationary basis, plus payment of unpaid emoluments. It ordered a new evaluation and prohibited that the co-defendant professors participate in the same. Finally, it found that the García-Alsina spouses suffered damages and mental anguish valued at $20,000.00.

As soon as we examine the uncontroverted facts established before the learned trial court we shall see that the same reflect a substantial and meritorious constitutional claim whose immediate redress could only have been remedied judicially. Pedroza Rivera v. Collazo Collazo, 108 D.P.R. 272 (1979); Pierson Muller v. Feijoó, 106 D.P.R. 552 (1977).

The cardinal premise whereupon the entire opinion of this court rests is not correct. This is not a simple discrepancy of approaches to educational philosophy

between petitioner García-Cabán and his evaluators. On the contrary, the judgment of the trial court is supported in that the decision not to renew his contract was motivated by ideological, political and personal prejudices as well as by economic and professional conflicting interests, which configure discrimination against him and in the substantial noncompliance with important procedural requirements established by regulation in order to achieve an objective and fair evaluation of his teaching work.

Let us examine with extreme scrupulousness the factual background as weighed by the original bench.

II

García-Cabán is a career professor with vast experience in the teaching field. He started teaching in the Public Education System in 1968-70.

During school years 1970-72 he was a professor of Humanities in the Cayey University College (CUC), University of Puerto Rico (UPR). Thereat he met and had serious personal differences -for ideological and political reasons- with professors Miguel Reckman and Castora Lozano-Berruazo. The latter two, together with Professor José González-Barza, were part of the Personnel Committee. They considered him "unqualified to teach and did not agree with his teaching methods."

After he obtained his doctor's degree Summa Cum Laude in Salamanca, Spain, in 1973-79 he held a chair at the Turabo University College. He had differences with management. At the end of those six (6) years he was denied tenure and his contract was not renewed. The then President of the University upheld such refusal. A judicial claim challenging

both decisions did not prosper.

Subsequently, in 1979-85 he was professor of philosophy at the Guayama Regional College of the Interamerican University.

During that same period he performed excellently as professor of humanities in the Carolina Regional College of the UPR. He published several articles on philosophy in academic publications and some columns of a political nature. He submitted a proposal to the "National Endowment for the Humanities," as a research project, which was accepted. The proposal dealt with the pedagogic system used in technological colleges for the teaching of Humanities. It proposed the establishment of alternate methods and suggested that the qualifications, motivation and attitudes of the professors be studied. This suggestion

produced great hostility among the Dean-Director of the College, the Director of the Dept. of Humanities and the members of the Personnel Evaluation Committee. They understood that it was not for García-Cabán to question the teaching methods. In the year 1982-83 said Personnel Committee, the Director, the lady Dean of Academic Associatesand the Dean-Director of the Regional College did not recommend renewal of the contract. We repeat, these negative recommendations were not due to his academic performance. On this extreme the evaluations were good. The negative recommendation was a result of García-Cabán's poor relations with the institution's teaching and managerial personnel. According to the court a quo, "there was a general ill-feeling in the College because of the plaintiff's presence because he was a

controversial person." Even so, the Chancellor for Regional Colleges decided to renew him in said College.

Subsequently García-Cabán used his affiliation and political influences within the New Progressive Party and was able to get the Office of the President of the University to assign funds for the creation of a new position in the Cayey University College. Said position, school year 1983-84, was granted to him in the month of September 1983, after the school year had started and his contract at the Carolina Regional College was not renewed.

Contrary to the established practice, the Committee of the Department of Humanities of Cayey was not consulted when this appointment was tendered. As previously stated, said Committee was of the opinion that García-Cabán was not

qualified to teach and disagreed with his teaching methods.

During the first semester of school year 1983-84 Professor García's work consisted of 3/4 administrative tasks and 1/4 teaching tasks. His immediate supervisor was pleased and satisfied with his administrative work.

The guidelines for the Cayey Regional College for the evaluation of the work of professors were Sections 49.3 (1) and 70.1.4 of the General Bylaws of the University of Puerto Rico and some internal

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(1) Section 49.3 provides:

"In the performance evaluations of the teaching staff for various purposes, the following factors will be considered: Section 49.3.1 - Quality of the teaching, the research or publication; Section 49.3.2 - Dedication to work and to university service; Section 49.3.3 - Compliance with teaching duties; Section 49.3.4 - Professional improvement; Section 49.3.5 - Cooperation in the faculty's work, to include committees and study

ones called Evaluation Standards for the Classroom Visit, and as part of these, some Instructions for the form titled Professor's Ability to Teach.

García Cabán was evaluated to determine whether his contract should be renewed. Except for classroom visits, in all of the remaining evaluation items he obtained ratings of excellent.

According to the trial court, during

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Continuation, Footnote (1):

programs; Section 49.3.6 - Research and creative work performed; Section 49.3.7 - Conferences on subjects within his/her field; Section 49.3.8 - Publications, exhibitions, concerts and other similar activities; Section 49.3.9 - Recognitions received; Section 49.3.10 - Grounded and substantiated opinions from co-workers and other persons related to his/her work; and Section 49.3.11 - Professional attitude: professor's willingness to participate in professional activities; his/her equity, tact, common sense, discretion and objectivity in the handling of situations in which he/she participates; spontaneous cooperation with the unit wherein he/she serves and with teaching in general."

the evaluation process substantial procedural defects and serious breaches of regulations were committed. To those effects, of all the factors listed under Section 49.3, the only one considered was quality of teaching. Under these, the analysis was prejudiced by the opinions that the evaluators held beforehand.(2) Nor was the time spent in the performance of administrative tasks considered, pursuant to Section 70.1 of the General

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(2) The court concluded:

"On this extreme Dr. Miguel Reckman testified at the hearing on the preliminary injunction that before he did the plaintiff's evaluation he had already made up his mind that he was not fit to teach, that with or without the evaluation he would have rejected him; that he went to the class to see whether he had changed; that it seems to him that only one visit to class is too little; that he recommends two visits. At the hearing on the permanent injunction he testified that the evaluation regulation had to be improved by incorporating two visits and other aspects such as meeting with the

Bylaws of the UPR. Furthermore, the rules for the classroom visit evaluation were circumvented in the following extremes: (a) the members of the Department's Committee did not discuss the items contained in the form titled "Professor's Ability to Teach" with Professor García-Cabán; (b) the Committee's report did

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Continuation, Footnote (2):

professor, visiting his/her home to see whether he/she has a library, typewriter, etc.

On the other hand, Dr. José González-Barja testified that prior to the plaintiff's evaluation he had a judgment about his person and teaching abilities that did not favor him; that there was a negative judgment among the professors concerning the plaintiff's personality and competence.

Dr. Castora Lozano testified at the hearing on the permanent injunction that plaintiff was an insignificant person and a bad professor. In the deposition taken of her she manifested that he was an upset person and she found him unpleasant. (Emphasis added).

not include: (1) remarks on the adequacy of the proposed lesson plan and the conduct of the same; (2) opinion on the quality of the evaluations made and the supporting materials used in the course: text, notes, homework, etc.; and a statement of the evaluated professor's weak and strong points, and their variance from previous evaluations.

In addition, a narrative report from the Department summarizing the previous reports, which should have been prepared by the Director together with the members of the Department's Committee, was not included. Neither was there included a summary of the students' evaluations, to include the evaluation sheets. In that regard, the evaluation consisted of a classroom visit of approximately 50 minutes. During that time professor Castora Lozano handed a form to Prof.

García-Cabán's students, for them to evaluate the class. The evaluation lasted 15 minutes.

Dr. José González-Barja, Director of the Department of Humanities, issued a narrative report of García-Cabán's evaluation and concluded that he had not been well accepted by the Department's professors. In his judgment it would not be "wise" to retain him. However, at the end of the Department's Committee's evaluation, he evaluated his performance as fair.

The Narrative Report of the Committee made up by professors Castora Lozano, Miguel Reckman and Pío López-Martínez rated the class as deficient. The students' evaluations were rated by the Department's Committee as good.

Like others, before evaluating him, the Director of the Department of

Humanities also had a negative image of Professor García-Cabán. He is a partisan of pragmatic thought, a current forcefully rejected by Drs. González-Barja, Pío López and Miguel Reckman.

The trial court determined that the revision of the Institutional Committee was "superficial and inadequate." The evaluation criteria utilized were not issued nor whether there had been compliance with the promulgated standards. This flaw extended throughout the entire consultation and appellate proces of the university system. The Evaluation Report of the Department's Personnel Committee subscribed by Professors José González-Barja, Pío López, Miguel Reckman and Castora Lozano-Berrueso reflects the following score:

| | Score | Teaching Work |
|---|---|---|
| Dept. Director | 206 | Fair |
| Dept. Committee | 122 | Deficient |
| Students' Eval. | 323 | Good |

García-Cabán communicated his disagreement and indignation with such evaluations. On 14 December 1983 he was notified by the Director that his appointment would not be renewed. He appealed to the President of the University and the case was returned to the Chancellor. He requested an interlocutory remedy from the latter. It was denied. He resorted to the court.

III

Judicial review of the acts of educational bodies, although limited, is proper when there are direct violations of constitutional rights or whenever they are patently arbitrary or lack a rational basis. This presupposes caution and prudence from the bench. After all, we judges do not have the information nor the expertise to review decisions on evaluations of teaching personnel.

However, the university's institutional discretion on academic and administrative matters does not completely exclude judicial scrutiny. See Vicéns v. U.P.R., particular vote of 22 August 1986; Jorge v. Interamerican University, 109 D.P.R. 505, 512 (1980) (Reconsideration). Thus, without assuming the role of a superboard on tenure or replacing administrative skills criteria, the courts can explore whether the granting or denial of a contract to a professor upon conclusion of his probationary period is supported by a rational basis and grounded on substantial evidence or whether there has been arbitrariness, discrimination or violation of constitutional rights. Green v. Board of Regents of Texas Tech. University, 355 F. Supp. 249, (1979); Lieberman v. Grant, 474 F. Supp. 848 (1979); Powell v. Syracuse University,

580 P. 2d. 1150 (1978).

The task requires dedicated judicial zeal in the cases of non-tenured professors. Normally these are subjected to greater pressures. As was correctly consigned by the learned adjudging bench: "Although decisions on tenure or evaluation of professors bring about delicate and difficult problems in any educational system, this is no impediment for the establishment of limits to administrative discretion. On this particular, the courts are very cautious in differentiating between matters that are invested with great judicial interest, paying particular attention to compliance with the due process of law, and those zones reserved for administrative expertise and discretion. A young professor may have innovative ideas and a certain aggressiveness that may be thwarted by a

hostile administration, if he does not have some protection. Although the ideas of the young teacher may be wrong and his aggressiveness objectionable, his interest must receive some protection from the arbitrary or capricious actions of those who are required to evaluate him. To avoid arbitrariness and capriciousness, good standards must exist whereon to base decisions on retention and tenure. The slacker the procedure and more harmful the consequences for the professor, the greater the judicial scrutiny will be. Lastly, if the decision is based on reasons beyond the teaching task, the educational authorities may place themselves outside of their zone of expertise and their decision may not deserve judicial deference."

When confronting these principles of doctrine with the case at bar, an

objective analysis of the evidence shows that the evaluation of Prof. García-Cabán went beyond allowable limts in the pedagogic and teaching dimensions. Undoubtedly it was submerged in a sea of deep prejudices and personalisms. The intensity of the lesion to his rights transcends the administrative process. That he was in a probationary period is no impediment to extending constitutional and statutory guarantees to him. On the contrary, it makes patent the need for judicial intervention. Precisely, this was the last crucial year in order to obtain tenure afterwards. Before the antagonism of the members of the Committee, García-Cabán never had the slightest opportunity to be evaluated objectively. The spirit of the then current university regulations was regrettably violated. Curiously, only

the students, unaware of the passions and distrust of some faculty members, evaluated him fairly.

In good judicial sense, if we govern ourselves by this frame of facts, a decree judicial abstention based on the standards of exhaustion of administrative remedies or primary jurisdiction can hardly be sustained. In the university's academic and intellectual world, García-Cabán did not have the slightest opportunity to be evaluated impartially. This is not only unfair but paradoxical. "An intellectual must be enamored of truth. Without Pilate-like attitudes, he must seek truth, strive to find it and make it triumph; to discover what things are beneath the crust that covers them by human prejudices is the basic task of the philosopher in his relationship with truth (ORTEGA). And it is that of the

jurist who is dedicated to correctly interpreting and applying the judicial norm." Víctor M. Garrido de Palma, Derecho Civil y Metodología Jurídica, (Civil Law and Judicial Methodology), Rev. Gen. de Leg. y Jurisp., Volume XC, No. 3, 1985, page 472. We dissent. We would confirm the original forum.

/S/ Antonio S. Negrón García
ANTONIO S. NEGRON-GARCIA
Associate Justice

San Juan, Puerto Rico, April 20, 1988.
CERTIFIED to be a correct translation prepared by

/S/ Ernesto Quidgley
ERNESTO QUIDGLEY
U.S. Certified
Court Interpreter
(PL 95-539, 28 USC 1827)

CERTIFIED TRANSLATION:

SUPERIOR COURT OF PUERTO RICO
SAN JUAN, PUERTO RICO

| | | |
|---|---|---|
| EBENEZER GARCIA-CABAN, CARMEN MILAGROS ALSINA, and the Legal Conjugal Partnership formed by them | * | CIVIL NO: PE 84-1419 (1003) |
| Plaintiffs | * | ON: |
| | * | INJUNCTION, RENEWAL OF CONTRACT AND DAMAGES |
| vs. | * | |
| UNIVERSITY OF PUERTO RICO, CAYEY UNIVERSITY COLLEGE, JOSE LUIS MONSERRATE-VILA, et al | * | |
| Defendants | * | |

**JUDGMENT**

On February 21, 1985, this Court issued a Partial Judgment in the case at caption, by virtue whereof the Court ordered the defendants to reinstate the plaintiff to his position of Assistant

Professor by contract until he were submitted again to another evaluation in which co-defendants René A. Hernández, Castora Lozano-Berrueso, Pío López-Martínez, Miguel Reckman and José González-Barja did not participate.

Although in the aforesaid judgment the defendant party was ordered to compensate plaintiffs with an amount for the damages sustained, subsequently that provision of the judgment was set aside. The judgment also provided that the case continue open for further actions related to the permanent injunction.

After some incidents of a procedural nature occurred after the partial judgment was entered, the hearing on the permanent injunction was set for the 17th, 18th, 22nd and 23rd of October, 1985. The parties appeared in Court on the dates set. They were represented by their

respective attorneys, who presented documentary and testimonial evidence in support of their respective allegations. At the petition of the parties, the Court granted them a term for submitting their pleadings, which were properly filed.

After an overall analysis and assessment of the evidence presented by the parties both in the preliminary injunction hearing and in the permanent injunction, according to the provisions of the Rules of Evidence; after conferring the credibility that the witnesses deserved; after settling conflicting evidence and also considering the memorandums of law, the Court formulates the following:

**FINDINGS OF FACT**

1. The plaintiff is 45 years old, he is married and has three minor children.

2. The plaintiff has a Bachelor of Arts (Magna Cum Laude), from the University of Puerto Rico; a Master of Arts with a major in philosophy from the University of Puerto Rico and a Doctor of Philosophy (Summa Cum Laude) from the University of Salamanca, Spain.

3. The aforesaid plaintiff was a public schools teacher from 1968 to 1970; professor of humanities in the Cayey University College of the University of Puerto Rico in 1970-1972; professor of humanities in Turabo University College in 1973-1979; professor of philosophy in the Interamerican University from 1979-84; professor of humanities in the Carolina Regional College of the University of Puerto Rico in 1984 and Assistant Professor in the Cayey Regional College of the University of Puerto Rico in 1984.

4. The plaintiff is author of a great variety of articles published in newspapers, magazines; he has published books, course guides; he has done different research works in the fields of humanities and philosophy; he has presented conferences in diverse teaching centers; and he has also carried out other activities of intellectual and educational interest. See Plaintiff's Exhibit I (Curriculum Vitae).

5. While the plaintiff was working as a professor in the Turabo University College (1973-79) he was submitted to an evaluation and as a result of it he was recommended for a renewal of his contract for a third term. Plaintiff's Exhibit I, Permanent Injunction Hearing.

6. Although the plaintiff did not so admit in the preliminary injunction hearing nor in the deposition taken of

him, he requested tenure in the Turabo University College after having worked as professor of humanities in said institution for six years, but that petition was denied. Together with the denial of tenure, his contract as member of the teaching staff was terminated. He appealed before the President of said institution from the negative to grant him tenure and from the decision to terminate his contract for services. Said appeal was denied. See Plaintiff's Exhibit I, Permanent Injunction Hearing.

From the plaintiff's testimony at the permanent injunction hearing arises the fact that he brought a judicial claim against Turabo College because of the aforementioned decision, requesting his reinstatement to the teaching position that he had previously occupied and also requesting retroactive payment of the

salaries he had not received, but he was unsuccessful in that claim.

From his testimony at the preliminary injunction hearing it arises that he did not fight for his tenure in Turabo University College, which is contrary to what he declared at the permanent injunction hearing.

7. From the Turabo University College the plaintiff went to work at the Carolina Regional College where he started as substitute professor for Doctor Cialo, and when the latter died, he continued in the capacity of temporary professor. He rendered services in said institution from 1979 to 1983.

8. From his work in the Carolina Regional College the plaintiff has excellent evaluations, both of his teaching performance and of the other aspects of his work. See Plaintiff's

Exhibits 8 and 9, Preliminary Injunction Hearing.

9. At the preliminary injunction hearing the plaintiff stated that his contract at the Carolina Regional College ceased because he had been there during four years as temporary professor and according to the bylaws they could not continue to renew said contract; that it was mandatory that they grant him a probationary contract but they did not do so because they did not have neither funds nor a position available.

Contrary to the foregoing and according to the documentary and testimonial evidence submitted at the permanent injunction hearing, the plaintiff's contract as member of the teaching staff of the Carolina Regional College was terminated on June 14, 1983 (near the expiration date of the contract

for the year 1982-83), following the recommendation made by the Personnel Committee of the Department of Humanities. See Defendant's Exhibit 3, Permanent Injunction Hearing.

On July 9, 1982, before the termination of the contract for the year 1982-83, the Director of the Humanities Department of the aforesaid College communicated to the Director and Dean of said institution that the Department's Committee of the Humanities Department did not recommend the renewal of the plaintiff's contract for the year 1982-83 because he did not meet the conditions contained primarily in Section 49.3.11 of the General Bylaws of the University of Puerto Rico. See Defendants' Exhibit 6, Permanent Injunction Hearing.

In spite of the adverse recommendation made by the Personnel

Committee, which was endorsed by the Director-Dean of the Carolina Regional College, the Chancellor of Regional Colleges chose to renew the plaintiff's contract in that College for the year 1982-83. About this extreme see Defendants' Exhibit 5, Permanent Injunction Hearing, wherein the Director-Dean expresses to the acting Chancellor of the Regional Colleges Administration his insatisfaction with the renewal of the contract.

10. On August 4, 1983 the plaintiff filed an appeal before Chancellor Carlos E. Reoyo of the Regional Colleges Administration of the University of Puerto Rico, from the decision to deny him a new contract as member of the teaching staff of the Carolina Regional College. See Defendants' Exhibit 9, Permanent Injunction Hearing. That appeal did not

prosper because a new contract for teaching in the Cayey Regional College was granted to the plaintiff.

11. The plaintiff, using his affiliation to the New Progressive Party and his political influence within that group, was able to get the Office of the President of the University to assign funds for the creation of a new position in the Cayey University College. The aforesaid position was granted to him for school year 1983-84, in the month of September 1983, after the school year had started and after his contract at the Carolina Regional College was not renewed.

12. The negative recommendations of the Department's Personnel Committee, of the Director of the Department of Humanities, of the Dean of Academic Affairs and of the Director-Dean of the Carolina Regional College for plaintiff's

contract not to be renewed were not primarily due to his teaching performance, because in this respect the evaluations are good, but instead, to the poor relations between the plaintiff and the teaching and administrative personnel of the Institution. In other words, there was a general ill-feeling in the College because of the plaintiff's presence because he was a controversial person. See Defendants' Exhibit 5, Permanent Injunction Hearing.

13. Contrary to the established practice, the Department's Committee of the Humanities Department of the Cayey Regional College was not consulted when the appointment of the plaintiff was made. Had it been consulted, it would not have recommended him because its members knew the plaintiff from the time when he taught at the College during the years 1972-74.

At that time the opinion of the Committee was that the plaintiff was unfit to teach and they did not sympathize with his teaching methods. (This finding is based on the statements made by Drs. Miguel Reckman, Castora Lozano and José González-Barja during the preliminary injunction hearing).

14. During the first semester of school year 1983-84 the plaintiff's work in the Cayey Regional College consisted of 3/4 administrative tasks and 1/4 teaching tasks. His immediate supervisor was pleased and satisfied with his administrative performance.

15. The established guidelines for the evaluation of the performance of professors at the Cayey Regional College

are Sections 49.3 [1] and 70.1.4 of the

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[1] The members of the Department's Committee and the Director of the Humanities Department did not give any importance to the factors established in Section 49.3. On this particular, in the deposition taken of him, Dr. González-Barja pointed out that the substantive criterion to be evaluated is quality of teaching and that the other factors are secondary. On their part, Professors Pío López and Miguel Reckman, in a deposition taken of them, point out that the only criterion to be evaluated by the Department's Committee was quality of teaching.

Section 49.3 provides: "In the performance evaluations of the members of the teaching staff for various purposes, the following factors will be considered:

Section 49.3.1 - Quality of the teaching, the research or publication.

Section 49.3.2 - Dedication to work and to university service.

Section 49.3.3 - Compliance with teaching duties.

Section 49.3.4 - Professional improvement.

Section 49.3.5 - Cooperation in the faculty's work, to include committees and study programs.

Section 49.3.6 - Research and

General Bylaws of the University of Puerto Rico. In addition, the College had adopted certain internal guidelines called "Evaluation Standards for the Classroom Visit" and, as a part of these, some "Instructions" for the form titled "Professor's Ability to Teach".

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1/ Continued

creative work performed.

Section 49.3.7 - Conferences on subjects within his/her field.

Section 49.3.8 - Publications, exhibitions, concerts and other similar activities.

Section 49.3.9 - Recognitions received.

Section 49.3.10 - Grounded and substantiated opinions from co-workers and other persons related to his/her work.

Section 49.3.11 - Professional attitude: professor's willingness to participate in professional activities; his/her equity, tact, common sense, discretion and objectivity in the handling of situations in which he/she participates; spontaneous cooperation with the unit wherein he/she serves and with the institution in general."

16. The plaintiff was evaluated to determine whether or not his contract would be renewed. In all the items of the evaluation, except for classroom visits, he obtained ratings of excellent.

17. From the evidence submitted it arises that the evaluations made have the following procedural defects and/or failures to comply with the regulations:

A. The factors itemized under Section 49.3 were not taken into account in the evaluations of Professor Ebenezer García-Cabán. An attempt was made to consider the quality of teaching; however, it can be seen from the evidence submitted that the analysis of this factor was biased by the opinions that the evaluators held beforehand.

On this extreme Dr. Miguel Reckman testified at the hearing on the preliminary injunction that before he did

the plaintiff's evaluation he had already made up his mind that he was not fit to teach, that with or without the evaluation he would have rejected him; that he went to the class to see whether he had changed; that it seems to him that only one visit to class is too little; that he recommends two visits. At the hearing on the permanent injunction he testified that the evaluation regulation had to be improved by incorporating two visits and other aspects such as meeting with the professor, visiting his/her home to see whether he/she has a library, typewriter, etc.

On the other hand, Dr. José González-Barja testified at the preliminary injunction hearing that prior to the plaintiff's evaluation he had a judgment about his person and his teaching abilities that did not favor him; that

there was a negative judgment among the professors concerning the plaintiff's personality and competence.

Dr. Castora Lozano testified at the hearing on the permanent injunction that the plaintiff was an insignificant person and a bad professor. In the deposition taken of her she manifested that he was an upset person and she found him unpleasant.

B. The evaluations made did not consider Section 70.1.4 [2] of the General Bylaws of the University of Puerto Rico.

C. From the evidence submitted arise the following violations to the Evaluation

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[2] Section 70.1.4 provides that:

"The time during which the member of the teaching staff works on administrative tasks as his/her main function, being creditable for the requirement of years of satisfactory service for tenure, will be evaluated by the corresponding committees. Such evaluations will be based on the courses taught or the teaching tasks performed."

Standards for the Classroom Visit (see Plaintiff's Exhibit 24, Preliminary Injunction Hearing):

1. The members of the Department's Committee did not discuss the items contained in the form "Professor's Ability to Teach" with Professor Ebenezer García. (Plaintiff's Exhibit 24, Preliminary Injunction Hearing).

2. The Committee's report did not include:

a. Remarks on the adequacy of the proposed lesson plan and the conduct of the same.

b. Opinion on the quality of the evaluations made.

c. Opinion on the quality of the supporting materials used in the course; text, notes, homework, etc.

d. Indication of both the weak and strong points of the evaluated

professor and their variation regarding previous evaluations.

e. A narrative report from the Department summarizing the previous reports, a report that should have been prepared by the Director jointly with the members of the Department's Committee.

D. The Department Committee did not include in its report a summary of the students' evaluations, to include the students' evaluation sheets, as required by the "Evaluation Standards for Non-Permanent Teaching Personnel."

E. The evaluation made by the aforementioned Committee consisted of a visit to the classroom of a term of duration of approximately 50 minutes. During this period of time the department Committee, through Professor Castora Lozano, furnished a form to Dr. Ebenezer García's students, for them to evaluate

the class. The evaluation lasted 15 minutes.[3]

17. The director of the Department of Humanities, Dr. José González-Barja, issued a narrative report on the evaluation of Professor García-Cabán. In said report he presents a narrative on what he observed in his classroom visit and ends the same by saying the following:

> "Ebenezer García-Cabán has not been well accepted by the professors of the Humanities Department. Given this situation, I do not believe it would be 'wise' to retain him as a professor in this Department." See Plaintiff's Exhibit 26, Preliminary Injunction Hearing.

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[3] In a deposition taken of her, Professor Castora Lozano manifested that the students' evaluation was done the day after the Department Committee's evaluation. In a deposition taken of him, Dr. González-Barja explained on the particular that the students' evaluation is done on a different date from the one done by the Department Director and the Department Committee.

However, at the end of the Department Committee's evaluation Dr. González-Barja evaluates the teaching work as fair. (See Plaintiff's Exhibit 27, Preliminary Injunction Hearing).

18. The Narrative Report of the Department's Personnel Committee, composed by professors Castora Lozano, Miguel Reckman and Pio López-Martínez, expresses the following:

> "On October 24, professor Cabán's class was visited by the Department's Personnel Committee.
>
> The class was Humanities 3201. The class consisted of a superficial exposition of the objectives from the beginning, together with a praise to the College and the Committee.
>
> When reading the outline that the students had written down, without such annotations it could have been thought that this was the first lesson of the course.
>
> At a certain moment the class became some kind of 'ethics for walking around at home'.

At the end of the visit he explained two concepts that seemed to have something to do with the course:

a. Revolution means to go back.

b. The medieval people did not know that they were medieval.

Consequently, the evaluation of the Committee was as deficient." Plaintiff's Exhibit 19, Preliminary Injunction Hearing.

19. The evaluations given to the students of professor Ebenezer García-Cabán were assessed as good by the Department Committee. These evaluations were not shown to him, although the plaintiff asked for them.

20. The Director of the Humanities Department also had a negative image of professor García-Cabán before his evaluation. For example, in the deposition taken of him, he expressed that his colleagues considered that he was a maladjusted person. This position is in contrast with the definition of the

plaintiff's personality offered by professor Pío López, another member of the Department Committee.

21. Professor García-Cabán professes an educational philosophy which differs from that of his evaluators. According to the evidence presented, the plaintiff subscribes to the pragmatic thought, a trend which is forcefully rejected by Drs. González-Barja, Pío López and Miguel Reckman.

23. The revision performed by the Faculty Institutional Committee, chaired by Dr. René Hernández (professor of mathematics), is considered superficial and inadequate by the Court. The aforesaid professor explained that he had classified the case as difficult. However, the aforementioned Committee took between 30 and 45 minutes revising the writings submitted by the plaintiff and

arriving at a decision. From his testimony it clearly arises that in the revision of the plaintiff's case the Committee depended totally on the report presented by professor René Hernández himself. The latter, on his own part, did not take into account any other criterion in the evaluation except the recommendations of the Department's Committee, of the Director of the Humanities Department and the plaintiff's letter of release. Professor Hernández did not examine the evaluation criteria used in the case nor whether the published standards had been followed.

23. The evaluation report of the Department's Personnel Committee (Plaintiff's Exhibit 27, Preliminary Injunction Hearing), signed by Professors José González-Barja, Pío López, Miguel

Reckman and Castora Lozano-Berrueso, shows the following score:

| | Points | Teaching Work |
|---|---|---|
| Department Director | 206 | Fair |
| Department Committee | 122 | Deficient |
| Student Evaluations | 323 | Good |

24. Professor Ebenezer, through a letter dated November 21, 1983, (Plaintiff's Exhibit 32, Preliminary Injunction Hearing), manifested his disagreement and indignation with the evaluations of his teaching capacity. That letter was accompanied by a verbal message wherein he expressed to the chairman of the Personnel Committee, Dr. René Hernández, that Professor García-Cabán had stated that the causes for his bad evaluation were due to his having a teaching methodology different from his evaluators.

25. Through a memorandum dated December 9, 1983 (Plaintiff's Exhibit 25, Preliminary Injunction Hearing), the Director of the Humanities Department recommended to the Chairman of the Personnel Committee "not to close all doors for Ebenezer, just in case the reasons of an economic nature that motivated his arrival in Cayey should require to put again under his charge some sections that had no professor". Nevertheless, on December 14, 1983, (Plaintiff's Exhibit 33, Preliminary Injunction Hearing) Professor García-Cabán was notified that his appointment would not be renewed.

26. The plaintiff appealed to the President of the University and the case was remanded to the Chancellor. He requested an interlocutory remedy from the Chancellor and it was denied.

27. Among the damages suffered by professor Ebenezer García-Cabán there are serious economic losses and special injuries in the form of loss of income, loss of his home, loss of the capacity to obtain income, loss of his credit, harm to his health, the need to participate in the Food Stamps program, to stand in the required lines for the food stamps, serious emotional conflicts which have forced him to seek professional help, serious disturbances to his family life, loss of his self-esteem and of the esteem and respect on the part of his dearest loved ones.

Because of the non-renewal of the contract, the co-plaintiff, Mrs. Carmen M. Alsina, wife of plaintiff Ebenezer García-Cabán, also suffered anguishes and mental sufferings such as: anxiety, nervous stress, insecurity, despair;

unpleasantness; fights and conflicts with her husband; she lost esteem for him; she has suffered depressions; coolness in the intimate relations; she had to find a job; loss of the family's stability; the image that she has now of her husband as a professional is no longer the same.

Considering the foregoing findings of fact, the Court formulates the following:

**CONCLUSIONS OF LAW**

I

The University of Puerto Rico periodically evaluates its non-tenured teaching personnel in order to assess their fitness to continue holding a teaching position, to consider possible promotions in academic rank and to consider the possible granting of tenure.

The rules, criteria and procedures for conducting the evaluation are those established in the General Bylaws of the

University of Puerto Rico and those established by the President of the University.[4]

By regulatory provision, the direct evaluation is performed by the Faculty and Personnel Committees according to the standards established by the institutional units and approved by the University Board, which must be in harmony with the General Bylaws of the University.[5]

Although the direct evaluation of the teaching personnel is performed by the Department's Personnel and Faculty Committees, the decision of terminating a probationary appointment or denying a new probationary contract corresponds to the Chancellor or to the President, as the

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[4] Section 49.1 of the General Bylaws of the University.

[5] Section 49.2 of the General Bylaws of the University.

case may be. To those effects, Section 50.7 of the General Bylaws provides:

> "The Chancellor, in the case of the autonomous institutional units, or the President, in the case of the University Colleges of Cayey and Humacao, may terminate a probationary appointment without granting tenure whenever it is justified as it arises from the evaluation or evaluations made, notifying the affected person in writing."

Article 49.3 of the General Bylaws, previously cited in the Findings of Fact, contains the factors that must be taken into consideration when evaluating the performance of teaching personnel.

Aside from the Bylaws, the Cayey University College approved and circulated certain "Evaluation Standards for Non-Permanent Teaching Personnel and Evaluation Standards for the Visit to the Classroom". It is in controversy whether those standards are of a mandatory nature. Nevertheless, there is no doubt that they

were being implemented and were being used as evaluation guidelines.

It was established in the case that the aforesaid standards were not followed during the evaluation process and all the provisions of Section 49.3 of the Bylaws were not complied with either.

From Professor Reckman's own testimony it arose that the way in which the visit was conducted was inadequate and that only one visit was unfair.

Even assuming that the aforesaid standards were not mandatory, it was established that the members of the Personnel Committee of the Humanities Department took into account for their evaluation only the visit to the classroom which, according to Section 49.3 is only one out of the eleven evaluation requirements established by the Bylaws. The explanation give by Professor Reckman

in order to justify such action was that the Committee was required to evaluate only the visit to the classroom.

According to the evidence submitted, the reality is that the university authorities took into account only the recommendations of the Personnel Committee and the Department Director in order to determine whether they would renew the contract or not and their recommendation was negative. Consequently, if these components of the evaluation process did not consider the criteria of Section 49.3, nobody took them into account.

On the other hand, it also arises from the evidence that the faculty's Personnel Committee, chaired by Professor René Hernández, when performing their evaluation depended exclusively on the report submitted to it by the Personnel Committee and we have already established

that the latter was based only on one of the criteria. Likewise, the Chancellor, on his part, relied completely on the recommendations of the Committees and the Department Directors.

According to the foregoing, we conclude that the evaluation to which the plaintiff was subjected by both the Personnel Committee and the Faculty Committee, did not comply with the regulatory standards in force.

On these extremes our Supreme Court's jurisprudence is clear in that administrative regulations remain in effect and must be obeyed until they are repealed or amended, and their disuse or contrary practice will not prevail against their observance. Rosario Mercado v. San Juan Racing, 94 D.P.R. 634, 645 (1967). In Hernández García v. L.R.B., 94 D.P.R. 22, 29 (1967), cited with approval in

García v. Right to Employment Adm. 108 D.P.R. 53, (1978), it is established that "When an administrative agency establishes a rule to govern its proceedings, the same must be scrupulously observed... As soon as an agency exercises its discretion and adopts certain procedural rules under which it wants all adjudications to be made, it denies to itself the right to violate such rules..."

II

In the absence of violations to constitutional rights, the courts must only intervene in the revision of the actions of educational bodies when they are patently arbitrary or lack a rational basis. This function must be carried out with extreme caution since the judges do not have the information nor the expertise to review decisions on evaluations of teaching personnel. The courts are not

the appropriate bodies for the administration of the educational system not for resolving conflicts which arise from the daily operations of educational centers, unless constitutional values are directly violated. See discussion in the case of Bettios Martinez v. University of Puerto Rico, 107 D.P.R. 111 (1978) and Carbonfer v. City of Greenfield School District No. 6, 328 F. Supp. 550, 550 (1971); Orr v. Trinfer, 111 F. 2d 158 (1971); Epperson v. Arkansas, 393 US 97, 104 (1968); Bettios v. Infer Am. University, 232 F. 2d 1330 (1971).

Nevertheless, the wide discretion that an university institution may have in academic and administrative matters does not bar that in the judicial field we investigate whether there was reasonable use of that discretion or not, or whether that has been arbitrary and therefo

damages were caused that must be
reprossed. See Lopez v. Infergmatican
University, 101 D.P.R. 502, 515 (1980)
(Judgment on Reconsideration).

The prevailing standard for granting
of denial of a conflict to a professor at
the end of a proposition-by period process
the Conflict in the position of inserting
that the evaluation process has not been
affected by capriciousness, arbitrariness,
discrimination or violation of
constitutional rights and that the
decision reached is supported by a
rational basis and grounded on substantial
evidence. The courts have refused to
assume the role of acting as a superpost
on fenure and to reverse the correctness of
incorrectness of the decisions made by the
experts in the field. See Green v. Board
of Regents of Texas Tech. University, 332
F. Supp. 545 (1971);

Powell v. Syracuse University, 580 F.Sd 52, 55 (2d Cir. 1978); Lieberman v. Gant, 474 F. Supp. 848 (E.D.N.Y. 1979).

Professors without tenure are usually employed to fulfill temporary assignments. Thus, the contract may be more specific in order to avoid violations of their constitutional rights. An unsatisfied dismissal of a professor without tenure may cause him irreparable damages, because it seriously affects his future opportunities in the profession, especially if the dismissal is arbitrary or afflamafliating. If is evident that a professor whose contract is not renewed suffers a great inconvenience, because when he applies for a new job he must inform his previous employer and ordinarily he will be asked the reason why he left his previous job. It he does not state any reason, the new employer will resort to the former employer to ask

for reference. The damage to the
professor is barred and the opportunities
for a new employment are reduced.

Because of its relevance with the
master nudge consideration, it is proper
to quote the opinion in Amy Angelo v.
Administration of Race-Horse Sports, etc.,
28 L.T.S. #3, page 3618, the following:
extract:

"The right to a job, first is, the
and decent life is a principle
inalienable from man, pre-existing the
oldest of all known constitutions. The
nuclear-like quality of the transferred
Section 50 of our Constitution pests
among those rights which although not
mentioned explicitly in the text, the
people reserve for itself against the
created political power. See
Constitution of United States of
America, Amended, Art. IX: Constitution
of the Commonwealth, Article II, section
19: Ortiz Cruz v. Race-Horse Board, 101
D.P.R. 191, 19#-195 (1913): Journal of
Sessions of the Constitutional Convention,
V. #, pages 5230-5235: 5239-5#3: 5212-
5211. In effect, the Constitutional
Convention was very careful to expand
the scope of the concept of 'life' as an
inalienable right of man. One of its

distinguished delegates expressed on
first occasion the following view:

"The word 'life' contains a
whole series of rights pertaining to
merely presence, which are not
included in the word 'property,' nor
in the word 'property.' In other
words, if the word 'life' were
eliminated from first phrase so
construed in the history of this
first right, a fundamental change
would be made in first regard,
particularly when men on expansion
in the area of human rights is
occurring and now first a second
Bill of Rights pertains the
provisions XXII century-style
classical one is being recognized
and in first document, the right of
an education, the right of a job,
and the right of an adequate level
of life are also being set forth
as human rights.

All these rights which forget
and are necessary for the sub
development of the human
personality are passically
combined in the word 'life.' And
the clause of the sub process of
<u>law is certainly the main</u>
<u>history for its</u>
<u>generous.</u>" (Hon. Jose Trias Monge).
<u>Journal of Sessions, V. 3, pages</u>
1503-1521 (Emphasis ours)

One of the dismays first a captions

and slightly dismissed can cause of a

professor," teaching centers are required to comply with the minimum engineering or the due process of law," a process that may be exempted in the established regulatory agencies. If this were the case, the Contra General Law would not go into constitutional matters but require said teaching centers to comply with their own regulations in such a manner that they Engineer for the elected professor a Cultural and Art Treatment in keeping with the due process of law.

Although decisions on Fourth or evaluation of professors private sponsored and difficult problems in any educational system, this is no impediment for the establishment of limits to administrative discretion. On this basis, the courts are very cautious in differentiating between matters that are invested with First Judicial Interest,

paying particular attention to compliance with the due process of law, and those cases reserved for administrative expertise and discretion.

A young professor may have innovative ideas and certain aggressiveness that may be tempered by a hostile administration, it he does not have some protection. Although the ideas of the young researcher may be wrong and his aggressiveness objectionable, his interest must receive some protection from the slightly or capricious actions of those who are required to evaluate him.

To avoid slightness and capriciousness good safeguards must exist to require explanation of base decisions on retention and promotion. The aspect of the procedure and forum. The aspect of the correspondence for the professor, the Dean of the Industrial school will be.

Lastly, if the decision is based on reasons beyond the teaching task, the educational authorities may place themselves outside of their zone of expertise and their decision may not deserve judicial deference.

Considering the foregoing legal frame work, let us see its application to the facts of this case.

Professor García-Cabán is a career teacher who started in the teaching profession in 1968 working for the Department of Public Education. He obtained his Bachelor of Arts degree with high honors from the University of Puerto Rico in 1966; a Master of Arts Degree with a major in Philosophy from said institution in 1972; in 1978 he obtained a Doctor's Degree in Philosophy and Literature (Ph.D.) with high honors from the Civil University of Salamanca. From

1970 to 1972, the plaintiff worked in the Department of Humanities of the Cayey University College of the University of Puerto Rico. From 1973 to 1979 he worked as Professor of Humanities at the Turabo University College and in 1979 he was Professor of Philosophy in the Guayama Regional College of the Interamerican University. In 1979 he joined the University of Puerto Rico system and was tendered a contract with a temporary appointment by the Chancellor of the Carolina Regional College. That contract was renewed from year to year until June, 1983. In fiscal year 1983-84 the plaintiff was tendered a probationary appointment. Said appointment was tendered to the plaintiff by the central offices of the University and he was assigned to teach in the Cayey University College. Because the Personnel Committee

of the Humanities Faculty of said branch was not consulted as required by the Bylaws, the plaintiff's difficulties started here. The plaintiff, furthermore, is author of many articles of recognized intellectual value.

The entire previous history of the plaintiff was thrown by the wayside at the stroke of a pen with the stigma and fatal consequences that it entails when his contract was not renewed because the Personnel Committee composed by Professors Castora Lozano-Berrueso, Pío López-Martínez, Miguel Reckman and the Department Director, with only one visit to the classroom which lasted 50 minutes, and without considering any of the other factors required by the Bylaws, concluded that he was not fit to teach classes. Said conclusions, without any further investigation, were countersigned by the

Faculty Committee and finally adopted by he Chancellor with the previously stated result.

Likewise, Professor González-Barja, after concluding his own evaluation, recommended the dismissal of the plaintiff because of motives that were external to his evaluation, following the recommendations of the Personnel Committee, who did not want under any circumstance that the plaintiff continue as a faculty member.

Professor Reckman, one of the three members of the Department's Personnel Committee, expressed that he had already "made up his mind" regarding the plaintiff's ability to teach, even before the latter's arrival at the College; that had he been consulted for his appointment, he would have opposed because he considers him unfit; that with or without the

evaluation he would have rejected him, and that he made the visit to see whether he had changed. From his testimony it arises that he conceived his opinion of the plaintiff during the period of 1970-72 when both were professors at the Cayey University College. The aforesaid professor admitted also that the evaluation process being followed is unfair and he recommended an increase in the number of visits to the classroom and that the evaluation regulation had to be improved. He further admitted that the Committee had not complied with the majority of the standards for the visit to the classroom neither with the standards for the evaluation of the teaching personnel.

Professor Reckman's testimony exemplifies the deficiency of the procedure followed to evaluate the

plaintiff. He manifested certain ideological bias and the obvious personal hostility, economic and professional conflicts that existed among those called to evaluate the teaching performance of the plaintiff in this case.

On the other hand, Professor González-Barja, Director of the Humanities Department, confirmed also that the plaintiff had been received with displeasure by some faculty members and particularly by the members of the Personnel Committee because they were not consulted for his appointment. He indicated also that the plaintiff had a bad image among the faculty since the academic years of 1970-72.

On her part, Professor Castora Lozano-Berrueso, who assigned to the plaintiff a score of twenty-eight points for his teaching performance, had a

negative opinion of the plaintiff before evaluating him, since she had classified him as an insignificant and upset person, admitting that she found him unpleasant.

The analysis that we have made of the evidence submitted shows that the evaluation of the plaintiff was not limited to teaching or educational results, but that it was dominated by prejudice and personalism against the plaintiff.

Direct evidence is not required in order to establish the existence of prejudice or discrimination. Discrimination or prejudices can be inferred from indirect evidence. When discrimination occurs in a sophisticated disguise, the courts must scrutinize the evidence to insure it does not exist. See Olivieri v. Pierluisi, 113 D.P.R. 790, 791 (1983).

We conclude that in this case there is enough evidence to sustain the inference that the decision not to renew the plaintiff's contract was motivated by personal and to a certain extent ideological prejudices of those called upon to evaluate him. The fact that the plaintiff was in a probationary period is no impediment to extending constitutional and statutory guarantees to him. Even supposing that the Dean had the discretion not to renew the contract, that discretion, under the particular circumstances of this case, had to be exercised according to constitutionally valid criteria. If the discretion was motivated by unconstitutional or unlawful criteria, the resultant decision can not be sustained. The exercise of discretion must not serve as a screen for discrimination; otherwise it would be easy

to evade the constitutional guarantees. Báez Cancel v. Mayor, 100 D.P.R. 982, 989 (1972).

The defendant sustains that all discrimination or arbitrary or unreasonable acts are not prohibited; that the only discrimination that is prohibited is that which is specifically prohibited by our Constitution or by the laws enacted pursuant to the same. We do not share that position; on the contrary, we reject it. If we accept that position, the communists, nationalists and leftists in our country could not allege discrimination for political ideas because they do not belong to any registered political party. It is enough to have political ideas opposed to those held by the appointing authorities for the constitutional provision against discrimination to operate. Moreover, it

is possible to discriminate even within the same political party. Clemente González v. Housing Department, 114 D.P.R. 763 (1983).

Consequently, there can be discrimination because of personal motives or for the political or ideological beliefs of those assigned to evaluate or of the appointing authorities, and this discrimination is not different from the one contemplated by our Constitution, but it is comprised therein.

Pursuant to the preceding analysis, we conclude that the decision not to renew the plaintiff's contract is capricious, arbitrary, lacks a rational basis and, consequently, judicial intervention is justified.

III

Judicial action based on the Civil Rights Act is not subject, as a general

rule, to the standards of primary jurisdiction and exhaustion of administrative remedies, provided always that the constitutional issue obviously lacks substance or is patently without merits. Pedraza Rivera v. Collazo Collazo, 108 D.P.R. 272, 276 (1979). According to the aforesaid Act, an injunction can be filed to avoid an ongoing violation of civil rights, without first having to exhaust the administrative remedies. Febres v. Feijoó, 109 D.P.R. 676 (1978).

In order to determine whether the administrative remedies must be exhausted or not, when lack of jurisdiction over the case under its consideration is in controversy, the Court must consider the following factors:

1. The risk of causing irreparable damage to the affected party if the Court

postpones its intervention to allow for the continuation of the administrative proceedings.

2. The degree of clarity with which the absence or presence of jurisdiction arises.

3. The expertise possessed by the agency for settling matters pertaining to its jurisdiction.

In the case at bar we see clearly the irreparable damage that has been caused to the plaintiff and the damages that he continues to suffer; the Court's jurisdiction, according to the allegations of the complaint, is evident, and the alleged issues are not of the exclusive competence of the University.

On the other hand, neither is it necessary to exhaust administrative remedies when: the administrative action will cause an imminent material,

substantial and non-theoretical or speculative damage, wherein the balance of inconveniences between the damages that could be caused and the standard at issue justifies a deviation from the same; when the administrative remedy is a useless and ineffective effort which does not offer an adequate remedy. Widow of Iturregui v. Commonwealth of P.R., 99 D.P.R. 488, 491 (1970).

The case at bar offers a clear example of the reasons for the preterition of the administrative channel, since to require the same would be a useless effort.

For the aforesaid reasons we resolve that the allegations on lack of jurisdiction are not proper and that the case is adequate for the issuance of an injunction.

IV

In an action on damages based on the provisions of Article 1802 of the Civil Code, the plaintiff party must prove the occurrence of a damage, thee existence of guilt and negligence and the causal relation existing between the damage and the guilt and negligence of the defendant party. Portilla v. Carreras de Schira, 95 D.P.R. 804, 812 (1968); Burgos Quiñones v. Wat a Resources Authority, 90 D.P.R. 613, 619 (1964); Valle v. Amer. Int. Ins. Co., 108 D.P.R. 692 (1979).

The evidence submitted by the plaintiff party showed that Ebenezer García-Cabán not only suffered financial damages because of the salaries that he did not receive, but also that he and his wife experienced the sufferings and mental anguishes which are recorded in Finding of Fact No. 27, to which we remit. The Court

assesses the sufferings and mental anguishes experienced by Ebenezer in the amount of $12,000, and those suffered by his wife in $8,000.

Pursuant to the foregoing Findings of Fact and Conclusions of Law, the Court issues the following:

**JUDGMENT**

The complaint on permanent injunction is granted and, consequently, the Court ratifies its preliminary injunction order issued on February 21, 1985, ordering the university authorities to reinstate the plaintiff to his position of Assistant Professor with a probationary contract until he is again subjected to a new evaluation wherein co-defendants René A. Hernández, Castora Lorenzo-Berrueso ´sic,, Pío López-Martínez, Miguel Reckman and José González-Barja must not participate,

in order to determine whether his contract will be renewed.

The defendant party is ordered to solidarily pay to the plaintiff party the salaries he did not receive from the date when he was dismissed until the date when he was reinstated. Said compensation will be subjected to the corresponding withholdings for salaries, taxes, social security, etc. Estrella, et al v. Municipality of Luquillo, 113 D.P.R 617 (1982); Municipality of Mayaguez v. Rivera, 113 D.P.R. 467 (1982); Hernán Colón v. U.H.R.C., 84 J.T.S. 52.

The Court orders the defendant party to pay the costs, without any special provision for attorney's fees.

Enter and Notify.

Given in San Juan, Puerto Rico, on January 3, 1986.

/S/ Wilfredo Alicea López

WILFREDO ALICEA LOPEZ

Superior Court Judge

I certify:

Doris Morales
Clerk

By: Dep. Clk.

San Juan, Puerto Rico, April 28, 1988.

CERTIFIED to be a correct translation prepared by

/S/ Ernesto Quidgley

ERNESTO QUIDGLEY

U.S. Certified

Court Interpreter

(PL 95-539, 28 USC 1827)

CERTIFIED TRANSLATION:

IN THE SUPERIOR COURT OF PUERTO RICO

SAN JUAN SECTION

CIVIL NO. On:

PE-84-1419 INJUNCTION, etc.

Ebenezer García-Cabán, etc.,

Plaintiffs

vs.

University of Puerto Rico, etc.,

Defendants

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REPORT ON PRELIMINARY CONFERENCE

BETWEEN ATTORNEYS

TO THE HONORABLE COURT:

On August 16, 1985 at 2:00 P.M., the attorneys for the parties in the case at caption met at the office of the law firm of Ledesma, Palou & Miranda, located in the Banco de Ponce Building, Suite 1103, Hato Rey, Puerto Rico, in order to hold a

preliminary conference between attorneys prior to the holding of the pretrial conference to be held before the Honorable Court and the following report was prepared:

I- AMENDMENTS TO THE ALLEGATIONS

A. Plaintiffs:

The plaintiffs amend their allegations to have them conform to the findings of fact and conclusions of law made by the Honorable Court after the preliminary injunction hearing.

B. Defendants:

The defendants have no amendments to their allegations.

II- THEORIES:

A. Plaintiffs:

The plaintiffs' theory of facts incorporates by reference the findings of fact and conclusions of law made by the Honorable Court after the

preliminary injunction hearing.

B. Defendants:

The defendants have at no time violated the plaintiff's civil rights, as stated in the petition for review that the defendants herein submitted in this same cause of action before the Honorable Supreme Court of Puerto Rico. All of the allegations of the aforementioned petition for review are incorporated herein by reference.

III- STIPULATIONS OF THE PARTIES

None.

IV- CONTROVERSY

A. Plaintiffs:

According to the plaintiffs, it is only the amount of the damages.

B. Defendants:

Whether or not the defendants violated the plaintiff's civil rights.

V- DOCUMENTARY EVIDENCE

A. Plaintiffs:

1. All of the Exhibits presented at the preliminary injunction hearing.

2. Invoices, certifications, etc. showing the financial condition suffered by plaintiffs.

3. Government documents showing the financial needs suffered by plaintiffs.

4. Medical bills showing the plaintiffs' ailments.

5. Yesterday the defendants submitted to the plaintiffs a series of documents that they allege were recently compiled from diverse campuses of the University of Puerto Rico which they intend to offer in evidence. Plaintiffs object to the offering of said documents in evidence since the same are not

pertinent to the controversy and are not part of the plaintiff's personnel file. The same objection is raised as to the documents from the Turabo University College. Should the Honorable Court on its day decide that said documents are admissible in evidence, then we reserve the right to present any necessary documents to rebut or to complete the record.

B. Defendants:

In addition to the portion of the plaintiff's personnel file that had already been submitted in evidence for the preliminary injunction hearings, we intend to submit in evidence certain documents which were recently compiled from diverse campuses of the University of Puerto Rico and for some reason unknown to us were not contained in the personnel file of the plaintiff herein

that is kept at the Cayey University College. Copies of said documents were delivered to the plaintiffs through their attorney. In addition, the personnel file of the plaintiff herein that is kept at the Turabo University College will be submitted in evidence.

VI- DEPOSITIONS

A. Plaintiffs:

Plaintiffs reserve the right to depose the new witnesses that were announced during the preliminary conference between attorneys. They also reserve the right to take the deposition of any expert that defendants may announce.

B. Defendants:

The deposition of the medical expert that the plaintiffs may present regarding proof of damages still remains to be taken. This party will notify with enough time prior to the

hearing of the case on the merits whether it intends to submit in evidence any of the depositions it may have taken.

VII- TESTIMONIAL EVIDENCE

A. Plaintiffs:

1. Both plaintiffs.

2. Both of plaintiffs' children.

3. Rafael Rivera-Pérez.

B. Defendants:

The following is a list of the potential witnesses that defendants intend to utilize in the hearing of this case on the merits:

1. Professor Santiago Román
Carolina Regional College
Carolina, Puerto Rico

2. Professor Carlos Malinow
Carolina Regional College
Carolina, Puerto Rico

3. Professor José L. Casado
Carolina Regional College
Carolina, Puerto Rico

4. Professor Rosa Santana de Tirado
Carolina Regional College
Carolina, Puerto Rico

5. Professor Gilberto Moreno
Academic Planning Office
Regional Colleges Administration
Río Piedras, Puerto Rico

6. Professor Juan M. González-Lamela
Turabo University College
Caguas, Puerto Rico

7. An official from Turabo University College that as of yet we have been unable to identify.

8. The plaintiffs

9. Professor Lilliam Colón

10. Professor Marina Suárez

VIII- EXPERT EVIDENCE

A. Plaintiffs:

1. Dr. Rafael Rivera-Pérez

If for any reason Dr. Rivera-Pérez is unable to serve as plaintiffs' psychiatric expert, we will announce the name of the expert who will

replace him with sufficient time prior to the trial to enable defendants to depose him.

B. Defendants:

This party will announce its expert evidence as soon as it takes the deposition of the expert or experts that in any manner may have evaluated the plaintiffs. We also anticipate that we will offer expert evidence pertaining to the need of having teaching staff evaluations done by the corresponding Personnel Committees.

IX- ADDITIONAL MECHANISMS FOR DISCOVERY OF EVIDENCE

A. Plaintiffs:

Plaintiffs will present an interrogatory to defendants so that the latter can inform plaintiffs the general extremes that they intend to show through the newly announced witnesses.

B. Defendants:

As of this date plaintiffs have not furnished their answer to the interrogatory that defendants submitted to them and to those effects it is required that the answer to said interrogatories be furnished. In addition, defendants intend, as has been previously mentioned, to take the deposition of the expert or experts that the plaintiffs intend to utilize.

X- APPLICABLE LAW

A. Plaintiffs:

The conclusions of law drawn by the Honorable Trial Court after the preliminary injunction hearing are incorporated by reference. In addition, the Federal Civil Rights Act, 42 U.S.C. 1983 et seq. is completely applicable to the case, as well as applicable jurisprudence.

B. Defendants:

The presentation of applicable law included in the Petition for Review that this defendant party filed in this action before the Honorable Supreme Court of Puerto Rico is adopted by reference.

XI- TIME TO PRESENT EVIDENCE

A. Plaintiffs:

Approximately one-half day.

B. Defendants:

Approximately three (3) days.

XII- OTHER MATTERS

NONE.

In San Juan, Puerto Rico, this 16th day of August 1985.

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San Juan, Puerto Rico, May 5, 1988.

CERTIFIED to be a correct translation prepared by

/S/ Ernesto Quidgley

ERNESTO QUIDGLEY

U.S. Certified

Court Interpreter

(PL 95-539, 28 USC 1827)